

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

## LOOPS, LLC, and LOOPS FLEXBRUSH LLC,

## Plaintiffs,

V.

AMERCARE PRODUCTS, INC., *et al.*,

## Defendants.

CASE NO. C08-1064RSM

ORDER DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS, CLARIFY AND STRIKE  
PURSUANT TO FRCP 12

## I. INTRODUCTION

This matter comes before the Court on Defendants' Motion to Dismiss, Strike, and Clarify pursuant to FRCP 12. (Dkt. #27). Defendants raise a myriad of arguments, seeking dismissal of certain individuals and claims based on corporate, patent, trademark, and Washington state common law. Defendants also claim that several portions of Plaintiffs' complaint are either impertinent or unclear. Therefore Defendants argue that these portions should be stricken or made more definitive. Plaintiffs respond that Defendants misconstrue several aspects of the law, and that many of Defendants' arguments are premature. Notably, Plaintiffs do not oppose a specific argument brought by Defendants to strike certain words from a paragraph of Plaintiffs' complaint.

For the reasons set forth below, the Court agrees with Plaintiffs, and DENIES IN PART Defendants' motion.

## **II. DISCUSSION**

## A. Background

3 On July 11, 2008, Plaintiffs Loops, LLC and Loops Flexbrush LLC (collectively  
4 “Plaintiffs”) brought the instant lawsuit against several Defendants, including two corporations,  
5 two individual shareholders of those corporations, and several unnamed defendants which  
6 Plaintiffs indicate will be identified once ascertained.<sup>1</sup> Plaintiffs allege, among other things, that  
7 Defendants violated various patent and trademark laws when they sold flexible toothbrushes,  
8 that Plaintiffs claim they had a patent for, to a correctional facility in New York. The complaint  
9 further alleges that Defendants violated the Washington Consumer Protection Act as codified by  
10 RCW 19.86.020, and that Defendants engaged in fraud and unfair competition under  
11 Washington state common law. Prior to responding to Defendants’ complaint, Defendants  
12 brought the instant motion to dismiss, clarify, and strike pursuant to FRCP 12.

13                   Significantly, the Court precluded Defendants from replying to Plaintiffs' responsive  
14 brief via Minute Order. (Dkt. #39). Defendants had originally filed a motion for extension of  
15 time to reply to Plaintiffs' response, unfortunately on incorrect grounds. Defendants specifically  
16 claimed that Plaintiffs did not timely file their responsive brief, but the record clearly showed  
17 otherwise. Furthermore, the date that Defendants moved for an extension of time was the date  
18 their reply brief was due. Therefore, having failed to file a reply brief, the only relevant  
19 pleadings before the Court other than the complaint are Defendants' motion and Plaintiffs'  
20 responsive brief, and the declarations and exhibits in support thereof.

## B. Motion to Dismiss

Under FRCP 12(b)(6), the Court must dismiss a complaint if a plaintiff can prove no set of facts to support a claim which would entitle him to relief. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). In deciding a motion to dismiss, the Court accepts as true all material

<sup>1</sup> Neither party provided the Court with a restatement of the facts. Accordingly, the Court only briefly summarizes the relevant facts here.

1 allegations in the complaint and construes them in the light most favorable to the plaintiff. *See*  
2 *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002); *Associated Gen. Contractors*  
3 *v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). However, conclusory allegations  
4 of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Associated*  
5 *Gen. Contractors*, 159 F.3d at 1181. In short, a plaintiff must proffer “enough facts to state a  
6 claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955,  
7 1974 (2007). When a complaint is dismissed for failure to state a claim, “leave to amend should  
8 be granted unless the court determines that the allegation of other facts consistent with the  
9 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*  
10 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

11 Here, Defendants seek the dismissal of two named defendants, Jeffrey Hemming (“Mr.  
12 Hemming”) and Wendy Hemming (“Ms. Hemming”). Defendants also seek dismissal of: (1)  
13 any damages related to Defendants’ alleged infringement of Plaintiffs’ flexible toothbrushes  
14 from the period of February 26, 2008 through June 8, 2008; (2) Plaintiffs’ fraud claim; (3)  
15 Plaintiffs’ willful infringement, exceptional case, and attorneys’ fees claims; and (4) Plaintiffs’  
16 trade dress infringement claim. The Court addresses each argument in turn.

17 **1. Plaintiffs’ claims against Mr. and Ms. Hemming**

18 Defendants indicate that Mr. and Ms. Hemming should be dismissed because they are  
19 shareholders of their corporate employers, Defendant Phoenix Trading, Inc. dba Amercare  
20 (“Amercare”) and Defendant H&L Industrial (“H&L”). Furthermore, they argue that Plaintiffs’  
21 allegations focus on the conduct of the corporate defendants, and therefore Mr. and Ms.  
22 Hemming are shielded from any individual liability because Plaintiffs fail to allege a basis to  
23 disregard the corporate entities.

24 The Court recognizes that as a general rule, a corporation is considered an entity  
25 separate and distinct from its officers or shareholders. *Truckweld Equipment Co., Inc. v. Olson*,  
26 Wash.App. 638, 644, 618 P.2d 1017 (1980). However, “the court will disregard the  
27 corporate form when its recognition would aid in perpetuating a fraud or result in a manifest  
28 injustice.” *Id.* Moreover, it is well-established that “[a]n officer of a corporation . . . is liable

1 for a tort committed in the course and within the scope of his official duties to the corporation  
2 the same as any other agent or servant is liable for his torts.” *Johnson v. Harrigan-Peach Land*  
3 *Development Co.*, 79 Wash. 2d 745, 753, 489 P.2d 293 (1971) (citations omitted). Indeed,  
4 “[i]f a corporate officer participates in wrongful conduct or with knowledge approves of the  
5 conduct, *then the officer, as well as the corporation, is liable for the penalties.*” *Grayson v.*  
6 *Nordic Const. Co., Inc.*, 92 Wash. 2d 548, 554, 599 P.2d 1271 (1979) (citations omitted)  
7 (emphasis added). “Corporate officers cannot use the corporate form to shield themselves from  
8 individual liability.” *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wash. 2d  
9 298, 322, 553 P.2d 423 (1976).

10 Here, the allegations raised in Plaintiffs’ complaint clearly allege that Mr. and Ms.  
11 Hemming, as shareholders of Americare and H&L, are personally liable for their tortious  
12 conduct toward Plaintiffs. For example, Plaintiffs allege that Ms. Hemming, as president of  
13 Defendant Phoenix, specifically made “representations concerning the need for samples of  
14 Loops Flexbrush toothbrushes [that] were false” and that Ms. Hemming intended “to  
15 manufacture counterfeit toothbrushes in China to unfairly compete with Plaintiffs.” (Pls.’  
16 Compl., ¶¶ 5 and 112). The complaint also alleges, among other things, that Ms. Hemming’s  
17 conduct was in violation of the Washington Consumer Protection Act (“CPA”) as codified by  
18 RCW § 19.86.020. (*Id.*, ¶ 103). Furthermore, the complaint indicates that Mr. Hemming, as  
19 vice-president, secretary, and director of Phoenix, also participated in the misrepresentations to  
20 the detriment of Plaintiffs in violation of the Washington CPA. (*Id.*, ¶¶ 6 and 103). Under such  
21 circumstances, it is unequivocally clear that Plaintiffs have set forth allegations that, if true,  
22 would establish the personal liability of Mr. and Ms. Hemming. Dismissing either individual at  
23 this early stage of the proceedings would be premature.

24 **2. Damages related to Defendants’ alleged infringement from February  
25 26, 2008 through June 8, 2008**

26 Pursuant to 35 U.S.C. § 287(a), a party alleging infringement can only recover damages  
27 if the infringing party had notice of the patent. The statute specifically provides:

28 Patentees, and persons making, offering for sale, or selling within the United States any  
patented article for or under them, or importing any patented article into the United

1 States, may give notice to the public that the same is patented, either by fixing thereon  
2 the word "patent" or the abbreviation "pat.", together with the number of the patent, or  
3 when, from the character of the article, this cannot be done, by fixing to it, or to the  
4 package wherein one or more of them is contained, a label containing a like notice. *In*  
*the event of failure so to mark, no damages shall be recovered by the patentee in any*  
*action for infringement*, except on proof that the infringer was notified of the  
5 infringement and continued to infringe thereafter, in which event damages may be  
recovered only for infringement occurring after such notice. Filing of an action for  
infringement shall constitute such notice.

6 35 U.S.C. § 287(a) (emphasis added).

7 Based on this language, Defendants argue that Plaintiffs cannot recover damages for any  
8 alleged infringement between February 28, 2008 - the date that the United States Patent &  
9 Trademark Office granted Plaintiffs a patent for their flexible toothbrushes - and June 8, 2008 -  
10 the date that Plaintiffs provided actual notice of Plaintiffs' patent to Defendants. Plaintiffs  
11 respond that Defendants' arguments should be rejected because: (1) they have complied with  
12 the liberal pleading requirements of FRCP 8(a)(2); (2) whether Defendants had notice of  
13 Plaintiffs' patent is a question of fact; and (3) Plaintiffs are entitled to recover damages for pre-  
14 patent issuance acts pursuant to 35 U.S.C. § 154(d).

15 Irrespective of Plaintiffs' first or third arguments, the Court agrees with Plaintiffs'  
16 second argument that the issue of notice is a question of fact that precludes the Court from  
17 denying Plaintiffs damages during the time period at-issue. "Section 287(a) requires a party  
18 asserting infringement to provide either constructive notice (through marking) or actual notice  
19 in order to avail itself of damages." *American Medical Sys. Inc., v. Medical Eng'g Corp.*, 6  
20 F.3d 1523, 1537, n.18 (Fed. Ci. 1993). Furthermore, "[i]n determining whether the patentee  
21 marked its products sufficiently to comply with constructive notice requirement, the focus is not  
22 on what infringer actually knew, *but on whether patentee's actions were sufficient*, in the  
23 circumstances, to provide notice[.]" *Halliburton Services v. Smith Intern. Inc.*, 317 F. Supp. 2d  
24 719, 723 (E.D. Tex. 2004) (citation omitted) (emphasis added). Here, once Plaintiffs' patent  
25 was accepted by the United States Patent & Trademark Office on February 28, 2008, discovery  
26 may provide that Defendants had constructive notice of Plaintiffs' patent. As such, Plaintiffs  
27 may be entitled to damages after this date, and therefore Defendants' motion is denied.

28 Relatedly, the Court finds it worthwhile to address Plaintiffs' argument that Defendants

MEMORANDUM ORDER

PAGE - 5

1 may have had constructive notice of Plaintiffs' patent prior to February 28, 2008. Plaintiffs  
2 specifically indicate that they sent Defendants toothbrushes since early 2007 with the words  
3 "Patents Pending" on the original product packaging. Plaintiffs contend that this conduct  
4 provides sufficient notice for purposes of 35 U.S.C. § 287(a). However, the Federal Circuit has  
5 made clear that:

6 A "patent pending" notice gives one no knowledge whatsoever. It is not even a  
7 guarantee that an application has been filed. Filing an application is no guarantee any  
8 patent will issue and a very substantial percentage of applications never result in patents.  
What the scope of claims in patents that do issue will be is something totally  
unforeseeable.

9 *State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235 (Fed. Cir. 1985).

10 The Court acknowledges, however, that the *State Industries* case was determining  
11 whether the infringing party's conduct was willful, and not specifically discussing constructive  
12 notice for purposes of 35 U.S.C. § 287(a). Nevertheless, the Court notes that it is overly  
13 presumptuous of Plaintiffs to suggest that the words "Patents Pending" provide sufficient notice  
14 under 35 U.S.C. § 287(a).

15 **3. Fraud**

16 Defendants claim that Plaintiffs' fraud allegations are insufficient to state a claim for  
17 fraud under Washington law because Plaintiffs only aver that Defendants "intended" to defraud  
18 Plaintiffs. Furthermore, Defendants cite to a Washington case that indicates that "[t]o prevail  
19 on a claim of fraud, the plaintiff must prove with clear, cogent, and convincing evidence that the  
20 defendant made a material misrepresentation of *existing* fact." *Pace-Knapp v. Pelascini*, 2008  
21 WL 699279, \*4 (Wash.App. Div. 1) (emphasis in original) (*citing Pederson v. Bibioff*, 64  
22 Wash. App. 710, 723, n.10, 828 P.2d 1113 (1992)). While the Court agrees with Defendants  
23 that this is the relevant law on fraud in Washington state, the Court certainly does not follow  
24 Defendants' line of reasoning given the plain-language of Plaintiffs' complaint.

25 Plaintiffs clearly allege that Ms. Hemming, in her capacity as director of Phoenix, made  
26 material misrepresentations of *existing* fact. For example, Plaintiffs' complaint suggests that  
27 Ms. Hemming's "representations concerning the need for samples of Loops Flexbrush  
28 toothbrushes were false, as the true reason for the need for samples of Loops Flexbrush

1 toothbrushes was [Ms. Hemming's] intent to manufacture counterfeit toothbrushes in China to  
2 unfairly compete with Plaintiffs." (Pls.' Compl., ¶ 112). This is clearly an allegation that  
3 Defendants made a material misrepresentation to Plaintiffs at the time the statement was made.  
4 Therefore Plaintiffs have sufficiently pled a claim for fraud, and have provided Defendants with  
5 notice of such a claim. Defendants' arguments to the contrary are flatly rejected.

6 **4. Willful infringement, exceptional case, and attorneys' fees**

7 Defendants also argue that any allegations that they engaged in willful infringement, or  
8 that this case is an "exceptional case" that justifies attorneys' fees should be dismissed. In  
9 support of this argument, Defendants cite to *In re Seagate Technologies, LLC*, which suggests  
10 that "[t]o establish willful infringement, a patentee must show by clear and convincing evidence  
11 that the infringer acted despite an objectively high likelihood that its actions constituted  
12 infringement of a valid patent." 497 F.2d 1360, 1371 (Fed. Cir. 2007). Furthermore,  
13 Defendants claim that "[e]ven though an accused infringer may know of the plaintiff's patent  
14 application, this knowledge alone is not enough to demonstrate willfulness." (Dkt. #27 at 8-9).<sup>2</sup>

15  
16 With respect to whether this case is an "exceptional case" that justifies attorneys' fees,  
17 Defendants suggest that "courts have typically found cases to be exceptional where a party has  
18 engaged in bad faith litigation or inequitable conduct in the course of patent proceedings."  
19 (Dkt. #27 at 10) (citing *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 372  
20 F. Supp. 2d 833, 848 (E.D.Va. 2005)). Based on this language, Defendants presumptively state  
21 that Plaintiffs have not made a showing that this case is an "exceptional case."

22  
23  
24 <sup>2</sup> Defendants cite *Trading Technologies Int'l, Inc. v. eSpeed, Inc.*, an unpublished district court  
25 case from Illinois in support of this assertion. However, as they do repeatedly in their motion, Defendants  
26 fail to provide a pinpoint citation for the rule of law which they stand upon. In addition, Defendants simply  
27 cite to the case number for this particular case, rather than providing the specific slip copy citation. This  
28 error is particularly pronounced because *Trading Technologies* has at least ten different orders in the year  
2008 alone. Moreover, the Court will not engage in a fishing expedition to find the relevant rule of law that  
supports a party's assertion. The Court expects Defendants to properly cite cases as this litigation  
progresses.

1        However, as Plaintiffs suggest, it is premature at this stage of the proceedings to  
2 conclusively find that Defendants' actions did not constitute willful infringement. It is equally  
3 premature to hold that Defendants' are engaging in any bad faith litigation or inequitable  
4 conduct. As mentioned above, no discovery has commenced, and the Court's mandate at this  
5 stage of the proceedings is to assume that all allegations in a plaintiff's complaint are true. *See*  
6 *Bell*, 127 S.Ct. at 1965; *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (finding that a  
7 well-pleaded complaint may proceed even if it appears "that recovery is very remote and  
8 unlikely"). Moreover, the complaint suggests that Defendants are continuing to infringe upon  
9 Plaintiffs' patent by selling and offering for sale the toothbrushes at-issue to multiple  
10 correctional facilities nationwide even after February 28, 2008. (Pls.' Compl., ¶¶ 73, 85, 86).  
11 Therefore Plaintiffs suggest that Defendants' infringement was willful because they continued  
12 selling Plaintiffs' toothbrushes after the date the patent issued. In addition, Plaintiffs' complaint  
13 clearly alleges that Defendants acted inequitably, as indicated in their fraud allegations described  
14 above. Plaintiffs have therefore met their minimal requirement at this stage of the proceedings  
15 and Defendants' motion is denied.

16        **5. Trade dress infringement**

17        Defendants also seek dismissal of Plaintiffs' trade dress infringement claims based on the  
18 fact that Plaintiffs' complaint establishes that the toothbrushes at-issue do not survive the  
19 functionality test under the Lanham Act. Importantly, the Lanham Act makes "actionable the  
20 deceptive and misleading use of marks" and to "protect persons engaged in . . . commerce  
21 against unfair competition." 15 U.S.C. § 1127. To this end, the Lanham Act protects against  
22 both trademark and trade dress infringement. *See Kendall-Jackson Winery, Ltd. v. E. & J.*  
23 *Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998). To make a claim for either trademark or  
24 trade dress infringement, a plaintiff must meet three basic elements: (1) distinctiveness; (2) non-  
25 functionality; and (3) likelihood of confusion. *Id.*

26        An affirmative defense to a trademark or trade dress infringement claim is that the  
27 plaintiff's mark is functional. *See* 15 U.S.C. § 1115(b)(8). In other words, "[t]rademark or  
28 trade dress protection extends only to product features that are nonfunctional. A product

1 feature is functional ‘if it is essential to the use or purpose of the article or if it affects the cost  
2 or quality of the article, that is, if exclusive use of the feature would put competitors at a  
3 significant non-reputation-related disadvantage.’” *Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998) (*citing Qualitex Co. v. Jacobsen Prods. Co.*, 514 U.S. 159, 165 (1995)). As indicated by the Supreme Court in *Qualitex*, the policy behind such a rule is clear:

7 The functionality doctrine prevents trademark law, which seeks to promote competition  
8 by protecting a firm’s reputation, from instead inhibiting legitimate competition by  
9 allowing a producer to control a useful product feature. It is the province of patent law,  
10 not trademark law, to encourage invention by granting inventors a monopoly over new  
11 product designs or functions for a limited time . . . after which competitors are free to  
use the innovation. If a product’s functional features could be used as trademarks,  
however, a monopoly over such features could be obtained without regard to whether  
they qualify as patents and could be extended forever (because trademarks may be  
renewed in perpetuity).

12 *Id.* at 164-65.

13 Furthermore, to determine whether a product is functional, the Ninth Circuit has  
14 indicated that a court should consider the following factors: (1) whether the design yields a  
15 utilitarian advantage; (2) whether alternative designs are available; (3) whether advertising touts  
16 the utilitarian advantages of the design; and (4) whether the particular design results from a  
17 comparatively simple or inexpensive method of manufacture. *Disc Golf*, 158 F.3d at 1006  
18 (citations omitted).

19 In the case at bar, Defendants fail to establish why Plaintiffs’ trademark or trade dress  
20 claims should be dismissed under the functionality test. As Plaintiffs point out, Defendants do  
21 not indicate the relevant factors for the Court to consider. Instead, Defendants only  
22 conclusively allege that Plaintiffs’ complaint fails to set forth a proper trade dress infringement  
23 claim after restating lengthy portions of Plaintiffs’ patent onto two pages of their motion to  
24 dismiss. (See Dkt. #27 at 12-13). However, as described above, the inquiry into whether a  
25 party has properly pled a trade dress infringement claim is heavily fact-intensive. Likewise,  
26 whether a product is functional is equally fact-intensive. Indeed, both inquiries have multiple  
27 factors for the court to consider. The contours of trademark law, like patent law, are anything  
28 but black-and-white. Under such circumstances, and similar to Defendants’ other claims

1 seeking dismissal, it would be premature for the Court to dismiss Plaintiffs' trade dress  
2 infringement claim at this stage of the proceedings. Defendants' motion to dismiss this claim is  
3 denied.

4 **C. Motion for a More Definite Statement**

5 FRCP 12(e) provides that “[a] party may move for a more definite statement of a  
6 pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the  
7 party cannot reasonably prepare a response.” *Id.* “Motions for a more definite statement are  
8 viewed with disfavor, and are rarely granted.” *Margarita Cellars v. Pacific Coast Packaging,*  
9 *Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1999). This district court has recognized that “Rule 12(e)  
10 motions attack the intelligibility of the complaint, not the lack of detail, and are properly denied  
11 where the complaint notifies the defendant of the substance of the claims asserted.” *Presidio  
12 Group, LLC v. GMAC Mortg., LLC*, 2008 WL 3992765, \*1 (W.D. Wash. Aug. 25, 2008)  
13 (citations omitted). Thus, in evaluating a motion under FRCP 12(e), the proper test is to  
14 determine “whether the complaint provides the defendant with a sufficient basis to frame his  
15 responsive pleadings.” *Federal Sav. and Loan Ins. Corp. v. Musacchio*, 695 F. Supp. 1053,  
16 1060 (N.D. Cal. 1988).

17 Based on these rules, Defendants seek to clarify three paragraphs of Plaintiffs'  
18 complaint: (1) paragraph 43 which discusses “other trademarks”; (2) paragraph 76 which  
19 discusses damages under 35 U.S.C. § 284; and (3) paragraph 93 which claims that Plaintiffs  
20 have been harmed in “other ways.” With respect to Defendants’ first argument, Plaintiffs do not  
21 oppose striking the words “and other trademarks” from paragraph 43 of their complaint.  
22 Therefore Defendants’ motion to clarify this paragraph is now moot, and the words “and other  
23 trademarks” shall be stricken.

24 With respect to Defendants’ contention that paragraph 76 should also be clarified, the  
25 Court finds no justification for such a request. The paragraph explicitly alleges that Plaintiffs  
26 are claiming that they are “entitled to recover damages as provided by 35 U.S.C. § 284 and  
27 reasonable attorneys’ fees as provided by 35 U.S.C. § 285.” (Pls.’ Compl., ¶ 76). The  
28 paragraph is also embedded in Plaintiffs’ first claim for relief for patent infringement. This claim

1 incorporates and re-alleges most of the facts included in Plaintiffs' complaint. As a result,  
2 Plaintiffs have clearly placed Defendants on notice regarding the substance of their claims, and  
3 Defendants also have a sufficient basis to frame their responsive pleadings To the extent that  
4 Defendants allege that they are unsure whether Plaintiffs are alleging damages beyond the  
5 period between February 28, 2008 and June 8, 2008, such an argument ignores the plain-  
6 language of Plaintiffs' complaint. Plaintiffs never suggest that they are somehow limiting their  
7 relief for damages to a certain time period, nor do they preclude the recovery of damages in any  
8 way. In fact, the complaint lays out in great detail when Defendants began their allegedly illegal  
9 conduct, and therefore provides more than sufficient notice of when their damages began  
10 occurring. In any event, Plaintiffs clearly indicate in their response that Defendants may assume  
11 that the period of claimed damages will be outside of the time period of February 26, 2008  
12 through June 8, 2008. Therefore Defendants' arguments are rejected, and their motion to  
13 clarify paragraph 76 of Plaintiffs' complaint shall be denied.

14       Lastly, Defendants contend that paragraph 93 of Plaintiffs' complaint that suggests that  
15 Plaintiffs have been harmed in "other ways" should be clarified. They claim that they have no  
16 idea how to respond to the "other ways" in which they have been harmed. This argument seems  
17 trivial when the words "other ways" are placed in the context of paragraph 93. The paragraph  
18 provides:

19       [Plaintiffs have] been harmed, among other ways, in that [their] toothbrushes were  
20 misused in that Defendants' acts have allowed Defendants to unfairly reap the  
advertising and promotional value that would otherwise go to Plaintiff[s]. By presenting  
21 customers with a sample of [Plaintiffs'] product, represented to be [Plaintiffs'] product  
or equal, and either falsely or impliedly representing that they have the authorization to  
sell or offer for sale the product, Defendants have misrepresented the origin of  
22 [Plaintiffs'] product, as well as the origin of its own product, resulting in harm to  
[Plaintiffs].

23 (Pls.' Compl., ¶ 93).

24       Additionally, like paragraph 76 described above, this paragraph is embedded in  
25 Plaintiffs' fourth claim for relief, and incorporates and re-alleges most of the facts included in  
26 Plaintiffs' complaint. Therefore it is clear that Plaintiffs have adequately stated the facts and  
27 circumstances surrounding this claim, and have given Defendants a sufficient basis for which to  
28

1 respond. Plaintiffs have detailed the circumstances known to them at this time, and no doubt  
2 include the words “other ways” to suggest that discovery may produce other examples of how  
3 Defendants have allegedly misused Plaintiffs’ toothbrushes to Plaintiffs’ detriment. As a result,  
4 Defendants’ motion to clarify paragraph 93 shall be denied.

5 **D. Motion to Strike**

6 Pursuant to FRCP 12(f), “[t]he court may strike from a pleading an insufficient defense  
7 or any redundant, immaterial, impertinent, or scandalous matter.” *Id.* One district court within  
8 the Ninth Circuit has described that:

9 Redundant allegations are those that are needlessly repetitive or wholly foreign to the  
10 issues involved in the action. Immaterial matter is that which has no essential or  
11 important relationship to the claim for relief . . . being pleaded. Impertinent matter  
consists of statements that do not pertain, are not necessary, to the issues in question.  
Superfluous historical allegations may be stricken.

12 *Cazars v. Pacific Shore Funding*, 2006 WL 149106, \*2 (C.D. Cal. 2006) (internal quotations  
13 and citations omitted).

14 “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money  
15 that [arises] from litigating spurious issues by dispensing with those issues prior to trial.”  
16 *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Moreover, if the  
17 motion has the effect of “streamlining the ultimate resolution of the action, the motion to strike  
18 will be well taken.” *California v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981).  
19 Nevertheless, a motion to strike, like a motion for a more definitive statement under Rule 12(e),  
20 is “looked on with disfavor because of the tendency for such motions to be asserted for dilatory  
21 purposes.” *Id.* (citing 5 Wright & Miller, Federal Practice & Procedure, Civil § 1380 at 783  
22 (1969)).

23 Here, Defendants seek to strike any allegations made by Plaintiffs regarding other  
24 products manufactured by Plaintiffs, such as dental floss and toothbrush holders, as well as  
25 other “trademark phrases” which Plaintiffs assert throughout their claim. In addition,  
26 Defendants seek to strike any allegations made in the complaint that the city of New York  
27 contributed to the delay or otherwise withheld documents that Plaintiffs needed to obtain the  
28 necessary information to bring their claims. Defendants also move to strike any allegations in

the complaint that its toothbrushes were “counterfeit and infringing” Plaintiffs’ patent.

However, all of Defendants' arguments fail. As Defendants readily admit, this is indeed a complex case. Plaintiffs clearly included detailed facts at this time to provide notice to Defendants as well as meet their pleading requirements under the Federal Rules. Furthermore, all the facts that Defendants seek to strike are part of the story as to why Plaintiffs bring their claims to this Court. The Court finds that there is nothing redundant, immaterial, or impertinent about such facts. Whether or not they are true is a different matter. As a result, striking any facts or claims simply because Defendants make the naked assertion that they are impertinent or immaterial has no basis in the law. Defendants' motion to strike is denied.

### **III. CONCLUSION**

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Defendants' Motion to Dismiss, Strike and Clarify Pursuant to FRCP 12 (Dkt. #27) is DENIED IN PART. Plaintiffs do not dispute that the words "and other trademarks" used in ¶ 43 of Plaintiffs' complaint should be stricken, and therefore Defendants' specific request to clarify this paragraph is STRICKEN AS MOOT. All other arguments are declined. Defendants are DIRECTED to file an answer to Plaintiffs' amended complaint within twenty (20) days from the date of this Order.

(2) The Clerk shall provide a copy of this Order to all counsel of record.

DATED this 13<sup>th</sup> day of November 2008.

  
RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE